(5)

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

No. 02-27

In The

Supreme Court of the United States

ALLINA HEALTH SYSTEM CORP., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,
EX REL. MINNESOTA ASSOCIATION OF
NURSE ANESTHETISTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS AND SUPPLEMENTAL APPENDIX

JOHN D. FRENCH
Counsel of Record
for Petitioners
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

24pp

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE EIGHTH CIRCUIT IMPERMISSIBLY DEVIATED FROM THE PLAIN MEANING OF THE FALSE CLAIMS ACT'S JURISDICTIONAL PROVISIONS	1
A. MANA Is Not An Individual	1
B. MANA Has No Direct Knowledge	3
C. The Circuits Are Split On The FCA's Presuit Disclosure Requirements	5
II. ARTICLE III DOES NOT PERMIT QUI TAM RELATORS TO PURSUE ABSTRACT CLAIMS WHERE NO INJURY HAS OCCURRED	6
III. THE EIGHTH CIRCUIT'S RULING CONFLICTS WITH OTHER CIRCUITS ON THE FCA'S FALSITY AND INTENT REQUIREMENTS	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Barnhart v. Sigmon Coal Co., 122 S. Ct. 941 (2002)..... 2

Federal Recovery Services, Inc. v. United States, 72 F.3d 447 (5th Cir. 1995)..... 5

Rowland v. California Men's Colony, 506 U.S. 194 (1993)..... 3

United States ex rel. Barth v. Ridgedale Elec., Inc., 44 F.3d 699 (8th Cir. 1995)..... 4

United States ex rel. Durcholz v. FKW, Inc., 997 F. Supp. 1159 (S.D. Ind. 1998), *aff'd*, 189 F.3d 542 (7th Cir. 1999) 3

United States ex rel. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co., 183 F.3d 1088 (9th Cir. 1999)..... 3

United States ex rel. S. Prawer & Co. v. Fleet Bank, 24 F.3d 320 (1st Cir. 1994) 3

United States v. Bornstein, 423 U.S. 303 (1976) 6

United States v. Middleton, 231 F.3d 1207 (9th Cir. 2000)..... 3

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 1, 2, 3, 6, 7

FEDERAL STATUTES

The Dictionary Act, 1 U.S.C. §§ 1-7
1 U.S.C. § 1.....1, 3

False Claims Act, 31 U.S.C. §§ 3729-3733
In general .....*passim*

TABLE OF AUTHORITIES – Continued

Page

31 U.S.C. § 3729(a) 6

31 U.S.C. § 3730(e)(4)(B) 1, 3, 4, 5

FEDERAL REGULATIONS

42 C.F.R. § 414.46(c)(2)(ii) (1991) 8

42 C.F.R. § 414.46(c)(3) (1991) 7

LEGISLATIVE HISTORY

S. Rep. No. 99-345 (1986) 2

ARGUMENT

I. THE EIGHTH CIRCUIT IMPERMISSIBLY DEVIATED FROM THE PLAIN MEANING OF THE FALSE CLAIMS ACT'S JURISDICTIONAL PROVISIONS

Petitioners argued that the federal courts lacked subject matter jurisdiction over this action because the lower courts found it to be one based upon prior public disclosures, namely an earlier filed antitrust action and news reports, and because the respondent Minnesota Association of Nurse Anesthetists ("MANA") could not come within the False Claims Act's ("FCA" or "Act") definition of an "original source," 31 U.S.C. § 3730(e)(4)(B), entitled to maintain a qui tam action in those circumstances. Pet. 7-18. MANA defends the Eighth Circuit's conclusions that a trade association is "an individual," and that an association impliedly shares the direct knowledge of all its members, and claims the Eighth Circuit was justified in splitting with the D.C. and Sixth Circuits on the pre-suit disclosure required of an original source. Br. Opp. at 5-16. Respondent identifies no unresolved factual issues that preclude review by this Court now of these threshold jurisdictional questions.

A. MANA Is Not An Individual

Relying on the plain meaning of the words "an individual" in the False Claims Act's definition of "original source," 31 U.S.C. § 3730(e)(4)(B); the Dictionary Act, 1 U.S.C. § 1; long-held canons of statutory construction; and this Court's recent decision in *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 and n.17 (2000), petitioners argued that the nonprofit corporation MANA was not "an individual," and there the statutory and jurisdictional inquiry must end. Pet. 9-13. MANA responds first by contending that restricting "individual"

to its plain meaning of a natural person "would dramatically restrict the ability of persons with direct knowledge of fraud to recover damages on behalf of the Government." Br. Opp. 6. MANA misperceives Congress's intent in the False Claims Act. The Act is principally aimed at apprising the government of the existence of false claims and ensuring the government's ability to recover overpayments, not with enriching private qui tam relators. Pet. 7. The entire original source inquiry presumes that a prior public disclosure of allegations of fraud has occurred, enabling the government to proceed directly if the allegations have merit, without relying on a relator's knowledge. No policy preference of qui tam relators can justify ignoring the plain meaning of the statutory term restricting original source status to "an individual," *Barnhart v. Sigmon Coal Co.*, 122 S. Ct. 941, 956 (2002), and the government loses no opportunity to pursue otherwise undisclosed fraud through reading the original source provision according to the plain meaning of its terms.[1]

The cases cited by respondent in support of the Eighth Circuit's interpretation do not address congressional intent in confining original source status to individuals. Br. Opp. 6-7. They also predate *Stevens*, which holds that "individual" in the context of the False Claims Act has its

[1] While resort to legislative history is not proper as the statute is plain on its face, the limited discussion of qui tam relators in the FCA's history focuses on encouraging individuals with knowledge of fraud to come forward, not providing associational litigants with additional remedies. *See, e.g.*, S. Rep. No. 99-345, at 14 (1986) (noting testimony that "private individuals" need a vehicle to disclose fraud and to break "the current 'conspiracy of silence' among Government contractor employees").

ordinary definition, distinct from corporations, associations or other private organizations. 529 U.S. at 786 and n.17.[2]

B. MANA Has No Direct Knowledge

Petitioners argued that, as a nonprofit corporation, MANA does not possess the "direct . . . knowledge of the information on which the allegations are based," 31 U.S.C. § 3730(e)(4)(B), necessary to be an original source. At most, MANA could only share direct knowledge with its authorized agents, and MANA's certified registered nurse anesthetist ("CRNA") members were agents of their hospital employers when they allegedly observed false claims. Pet. 13-15.

MANA supports its claim of direct knowledge of false claims by contending that,

> the record shows that MANA itself engaged in an independent investigation of Petitioners' fraud.

---

[2] Two of the appellate cases cited by MANA, *United States ex rel. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co.*, 183 F.3d 1088 (9th Cir. 1999), and *United States ex rel. S. Prawer & Co. v. Fleet Bank*, 24 F.3d 320 (1st Cir. 1994), do not reach the original source issue at all. *United States ex rel. Durcholz v. FKW, Inc.*, 997 F. Supp. 1159, 1166 (S.D. Ind. 1998), *aff'd*, 189 F.3d 542 (7th Cir. 1999), plainly focuses on the individual relator Robert Durcholz in finding original source status.

United States v. Middleton, 231 F.3d 1207 (9th Cir. 2000), does not support the conclusion that a trade association or corporation can be an "individual" within the meaning of 31 U.S.C. § 3730(e)(4)(B). Br. Opp. 7 n.6. The Ninth Circuit in *Middleton* concedes that "the Dictionary Act's [1 U.S.C. § 1] definition of 'person' implies that the words 'corporations' and 'individuals' refer to different things," 231 F.3d at 1211, but claims an exception to the plain meaning may apply based on "the texts of other related congressional acts," *id.*, citing *Rowland v. California Men's Colony*, 506 U.S. 194, 199 (1993). In *Stevens* this Court determined that in the FCA an individual is distinct from a corporation or association.

> This investigation included interviewing its members, hiring of attorneys to research the law, and gathering evidence. . . .

Br. Opp. 11. MANA's contention that a relator can gain direct knowledge of allegations of false claims by hiring lawyers and investigating a third party's claim is not the law in any circuit. *See United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("A relator is said to have direct knowledge of fraud when he saw it with his own eyes. . . . On the other hand, a person who obtains secondhand information from an individual who has direct knowledge of the alleged fraud does not himself possess direct knowledge and therefore is not an original source under the Act. Accordingly, collateral research and investigations . . . [do] not establish direct and independent knowledge of the information on which the allegations are based within the meaning of § 3730(e)(4)(B).") (citations and quotations omitted).

Respondent's fallback position is to assert "associational standing." Br. Opp. 11-12 and n.11. That constitutional doctrine does not supersede the express statutory proscriptions on federal jurisdiction crafted by Congress in the False Claims Act. The statute governs. MANA is a Minnesota nonprofit corporation. Pet. App. 352.[3] Under Minnesota law the members of a nonprofit corporation are not the agents of the corporation. Pet. 14. MANA does not share whatever direct knowledge its CRNA members may have of purported false claims.[4]

---

[3] Respondent speciously asserts a "dispute below as to the corporate status of MANA." Br. Opp. 13 n.12. MANA's articles of incorporation are public records, and MANA cannot deny its corporate existence.

[4] Also irrelevant to the jurisdictional inquiry is whether "MANA's express purpose was to promote the practice of anesthesia and to support nurse anesthetists to provide anesthesia in hospitals." Br.

(Continued on following page)

C. The Circuits Are Split On The FCA's Pre-suit Disclosure Requirements

The Eighth Circuit acknowledges that its decision creates a split between itself and the D.C. and Sixth Circuits on the pre-suit disclosure requirements imposed by 31 U.S.C. § 3730(e)(4)(B) on original sources. Pet. App. 34. As MANA's only pre-suit disclosure to the government post-dated the public disclosure of the allegations at issue, MANA could not be an original source in the D.C. or Sixth Circuits. Pet. 16-18. Respondent contends that no circuit split "warranting review" exists. Br. Opp. 13.

The importance of the split in the circuits on the pre-suit disclosure requirements is obvious and worthy of review. The Eighth Circuit has allowed MANA to proceed as an original source relator in a case which seeks over $1,000,000,000 in damages and fines. Given MANA's failure to provide the government with any nonpublic information regarding its members' allegations before filing suit, the Sixth and D.C. Circuits would have affirmed the dismissal of MANA's claim for lack of subject matter jurisdiction. Such gross disparities in health care providers' potential liabilities by geographical happenstance warrants this Court's review.[5]

Opp. 12 n.11. A corporate entity's organizational purpose will not allow it to evade the restrictions on federal jurisdiction embodied in 31 U.S.C. § 3730(e)(4)(B). *Cf. Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 452 (5th Cir. 1995) (finding relator that was "incorporated with the express purpose of pursuing qui tam litigation based on the information that others . . . had already obtained," had no direct and independent knowledge and was not an original source).

[5] While MANA claims to have provided nonpublic information to the government before filing the qui tam complaint, Br. Opp. 16 n.15, the Eighth Circuit's review of MANA's extensive filings determined only

(Continued on following page)

Respondent's policy argument that the rule of the Sixth and D.C. Circuits would unfairly deny relators their share of any False Claims Act recovery again demonstrates a misapprehension of the Act's goals. Br. Opp. 15. By precluding original source relators from proceeding if they do not disclose their knowledge to the government before public disclosure has occurred, the Sixth and D.C. Circuits simply recognize that the government can fully investigate publicly disclosed allegations and need not share recovery of the government's funds in such a case with any relator.

II. ARTICLE III DOES NOT PERMIT QUI TAM RELATORS TO PURSUE ABSTRACT CLAIMS WHERE NO INJURY HAS OCCURRED

Petitioners presented the law holding that an Article III case or controversy exists only in the presence of an injury in fact; that in the context of the False Claims Act, a qui tam relator has standing only as an assignee of a portion of the government's claim for money damages, *Stevens*, 529 U.S. at 771; and that the government's damages are measured by the amount the government paid out by virtue of the false claim over and above what it would have paid had the claim been truthful. Pet. 18. Petitioners pointed out that both under the statutory language of 31 U.S.C. § 3729(a) and this Court's holding in *United States v. Bornstein*, 423 U.S. 303 (1976), absent conspiracy, a person is liable only for her own conduct, not that of others who have allegedly filed false claims. Pet. 19. Respondent sidesteps these propositions of law

---

that MANA had provided the government with a copy of its already public antitrust complaint before filing the FCA complaint. Pet. App. 34.

with a long string citation of pre-*Stevens* cases to argue that, "the False Claims Act clearly provides for recovery against defendants who submit false claims whether or not those false claims are ever paid." Br. Opp. 17 and n.16.

The hospital petitioners do not contend that they did not receive payment on their claims alleged to be false – claims for the services of CRNA employees when it was medically necessary for both an anesthetist and an anesthesiologist to devote their attention to a single case. Pet. App. 300-301. *See also* 42 C.F.R. § 414.46(c)(3) (1991), Supp. App. 3. Rather, the petitioners point out that there is no allegation that the nurses did not provide anesthesia services, *id.*;[6] that the hospitals billed for those services at the lower of the only two available rates for CRNAs, Pet. App. 372-373, 457-465; and that the Minnesota Medicare carriers intended that these claims be filed and paid at the lowest available rate, Pet. App. 333-335 and Supp. App. 7-8. MANA does not dispute these facts. MANA's contention that the hospitals billed falsely because they should have billed at the higher rate provided for nonmedically directed CRNA services is an artificial dispute in the air – the government obtained a hospital service, nurse anesthesia, at the lowest available rate.[7] Trumped up claims of false underbilling are exactly the sort of theoretical

---

[6] MANA again states, "It is [the] nurses that provided the services which Petitioners falsely represented had been provided by the doctors." Br. Opp. 11.

[7] The Eighth Circuit's error, abetted by the respondent and the United States as amicus below, is to find injury to the government from the hospital petitioners based not on their own bills for employee CRNA services, but by claiming that the independent anesthesiologists' billing caused the government to pay more than necessary for both providers' services taken together. With no evidence of conspiracy, Pet. App. 47-48, there is no basis in the False Claims Act for aggregating the hospitals' and the independent physicians' bills in this manner.

dispute without injury to the government that Article III precludes federal courts from entertaining.

III. THE EIGHTH CIRCUIT'S RULING CONFLICTS WITH OTHER CIRCUITS ON THE FCA'S FALSITY AND INTENT REQUIREMENTS

Petitioners argued that the Eighth Circuit improperly reversed summary judgment on alleged violations of the False Claims Act when no regulation or other source of law clearly prohibited the conduct alleged. Such a showing of falsity is an essential element of a False Claims Act violation as the law has developed in other circuits. Pet. 22-26. MANA does not refute petitioners' contention that the Medicare regulations at issue do not explicitly prohibit the conduct alleged to violate the FCA, and does not deny that the Eighth Circuit's ruling differs from other circuits in failing to address the threshold legal issue of falsity.

Petitioners also argued that the Eighth Circuit's ruling splits with other circuits in holding that reliance on contemporaneous government advice in filing claims does not as a matter of law negate the intent required for False Claims Act liability. Pet. 26-29; see also *Amici* Pet. 11-20. Petitioners demonstrated that between 1991 and 1993 Travelers, the local Medicare carrier for the Twin Cities, informed both hospitals, Pet. App. 382-389, and physicians, Pet. App. 469-472, who inquired that the phrase "continuously involved" in 42 C.F.R. § 414.46(c)(2)(ii) (1991), Supp. App. 2, did not require an anesthesiologist's constant physical presence in the operating room in order to bill a case as personally performed; that this interpretation was common among carriers nationally, App. 393-410; and that it was confirmed in 1993 by the Health Care Financing Administration ("HCFA"), Pet. App. 390-392.

See also Amici Pet. 7-8. Respondent does not contest these facts, but contends that in the late 1980s the other Minnesota carrier, Blue Cross Blue Shield, published a different interpretation of the requirements for personal performance billing, and that HCFA itself later (after commencement of this litigation) agreed with MANA's interpretation of the regulation at issue. Br. Opp. 19.[8]

There is no doubt that the Medicare bureaucracy – HCFA and the carriers – was in fundamental disarray as to the meaning of its anesthesia billing regulations during the early 1990s, the period covered by MANA's action. A person cannot be liable for knowingly violating regulations for which the government has no consistent interpretation.

The Second, Seventh, and Ninth Circuits have recognized, as a matter of law, that claims submitted in accordance with governmental guidance cannot meet the standard of scienter required by the False Claims Act. Pet. 26-29. As the amicus petition of the American Hospital Association and the Catholic Health Association of the

---

[8] Respondent mischaracterizes the record in its Brief in Opposition at 21 n.17 (among other ways by citing to the deposition of a Travelers official, Patrick Donohue, to claim admissions by Dan Roach, an in-house attorney for petitioner Allina Health System). As the correspondence at Pet. App. 382-389 shows, petitioner Allina fairly presented the issues surrounding personal performance billing to the carrier, and was told the physician need not be constantly present in such a circumstance. Mr. Roach testified that Allina was "in the position of relying on the advice that [Travelers] had given me." Appellees' Appendix to the Eighth Circuit (Oct. 14, 1999) at 625-626.

The Brief for Appellees to the Eighth Circuit (Oct. 14, 1999) at 11-16 details the full history of Travelers' interpretations and the 1992-1993 direction on personal performance billing given by the other Minnesota carrier, Blue Cross Blue Shield (which contradicts the memos from the late 1980s MANA cites, Br. Opp. 19), and each defendant group's reliance on one or another HCFA or carrier communication.

United States shows, the Eighth Circuit's contrary ruling creates a circuit split with national importance to health care providers, worthy of this Court's review.

CONCLUSION

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: August 19, 2002

Respectfully submitted,

JOHN D. FRENCH
Counsel of Record
for Petitioners
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

SUPPLEMENTAL APPENDIX
TABLE OF CONTENTS

Page

42 C.F.R. § 414.46 (1991), published in 56 Fed. Reg. 59502, 59628 (1991) ..... Supp. App. 1*

Additional excerpts from deposition of Medicare carrier (Travelers) representative Patrick Donohue, January 8, 1998 ..... Supp. App. 5

---

* The current form of 42 C.F.R. § 414.46 is reprinted in Petitioners' Appendix at 149-154.

§ 41[4].46 Additional rules for payment of anesthesia services.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Base unit* means the value for each anesthesia code that reflects all activities other than anesthesia time. These activities include usual pre-operative and post-operative visits, the administration of fluids and/or blood incident to anesthesia care, and monitoring procedures.

(2) *Time units* involve the continuous actual presence of the physician (or of the medically directed qualified anesthetist or resident) and start when he or she begins to prepare the patient for anesthesia care and ends when the anesthesiologist (or medically directed CRNA) is no longer in personal attendance, that is, when the patient may be safely placed under post-operative care.

(b) *General rules.*

(1) For physician anesthesia services furnished beginning January 1, 1992, HCFA bases payment on the lesser of the actual charge or the physician fee schedule amount in accordance with § 415.20.

(2) The physician fee schedule amount is based on the product of allowable base and time units and an anesthesia-specific CF [Conversion Factor].

(3) The allowable base units are determined by the uniform relative value guide based on the 1988 American Society of Anesthesiologists' Relative Value Guide except that the number of base units recognized for anesthesia services furnished during cataract or iridectomy surgery is

four units. The uniform base units are identified in program operating instructions.

(c) *Physician personally performs the anesthesia procedure.* (1) HCFA determines the fee schedule amount for anesthesia procedures personally performed by a physician on the basis of an anesthesia-specific fee schedule CF and unreduced base units and anesthesia time units. For purposes of this paragraph, one anesthesia time unit is equivalent to 15 minutes of anesthesia time, and fractions of a 15-minute period are recognized as fractions of an anesthesia time unit.

(2) HCFA considers an anesthesia procedure to be personally performed by a physician if it meets one of the following circumstances:

(i) The physician personally performs the entire anesthesia procedure.

(ii) The physician is continuously involved in a single case involving a certified registered nurse anesthetist (CRNA), anesthesiologist assistant (AA), or student nurse anesthetist.

(iii) For services furnished before January 1, 1994, the physician establishes an attending physician relationship in one or two concurrent cases involving an intern or resident as described in § 405.521 of this chapter. HCFA pays the full fee in each of these two concurrent cases. If the physician is involved in two concurrent cases with interns or residents after December 31, 1993, the payment rules in paragraph (d) of this section apply. (If the physician is involved in two concurrent procedures, one of which involves an intern or resident and the other a nonphysi-

cian anesthetist, the payment rules in paragraph (d) of this section apply.)

(3) No payment is made under the CRNA fee schedule for the services of a CRNA or AA involved in a procedure described in paragraph (c)(2) of this section unless HCFA determines that it was medically necessary for both the physician and the CRNA or AA to be involved in the same case.

(d) *Physician medically directs concurrent anesthesia procedures.* HCFA determines the fee schedule amount for concurrent medically directed anesthesia procedures furnished by a physician based on the anesthesia-specific fee schedule CF, reduced base units, and anesthesia time units. For purposes of this paragraph, one anesthesia time unit is equivalent to 30 minutes of anesthesia time, and fractions of a 30-minute period are recognized as fractions of an anesthesia time unit. The base unit of each concurrent medically directed anesthesia procedure furnished by a physician is reduced by the following percentages:

(1) Two procedures – 10 percent.

(2) Three procedures – 25 percent.

(3) Four procedures – 40 percent.

(4) If cataract or iridectomy anesthesia is one of the concurrent medically directed anesthesia procedures – 10 percent.

(e) *Physician medically supervises anesthesia procedures.* If the physician medically supervises more than four concurrent anesthesia procedures, HCFA bases the fee schedule amount on an anesthesia-specific CF and

three base units. This represents payment for the physician's involvement in the pre-surgical anesthesia procedures.

(f) *Payment for medical or surgical services furnished by a physician while furnishing anesthesia services.* (1) HCFA allows separate payment under the fee schedule for certain reasonable and medically necessary medical or surgical services furnished by a physician while furnishing anesthesia services to the patient. HCFA makes payment for these services in accordance with the general physician fee schedule rules in § 415.20. These services are described in program operating instructions.

(2) HCFA makes no separate payment for other medical or surgical services, such as the pre-anesthetic examinations of the patient, pre- or post-operative visits, or usual monitoring functions, that are ordinarily included in the anesthesia service.

(g) *Physician involved in multiple anesthesia services.* If the physician is involved in multiple anesthesia services for the same patient during the same operative session, the carrier makes payment according to the base unit associated with the anesthesia procedure having the highest base unit value and anesthesia time that encompasses the multiple procedures.

In The United States District Court
District of Minnesota

MANA, et al. vs. Unity Hospital, et al.

Deposition of Patrict Donohue-1/8/98

Donohue, Patrick V01 01/08/98

* * *

[27] A It's a bulletin that we issued to anesthesia providers in 1989.

Q I believe this was the earliest of the provider bulletins that you produced in connection with response to the subpoena, is that correct, earliest in time?

A It could be, yes.

Q Could you direct your attention to the second page of the exhibit, I guess it's page 3 of the document?

A (Examining document.)

Q Was the document responsive to the subpoena because of the material at the top of the page 3 beginning when an anesthesiologist and an anesthetist are both involved in a single procedure?

MR. STONE: Object to the form of the question.

A The document was produced because it was considered to be communications that we had with providers about anesthesia and that was one of the things called for in the subpoena.

Q Okay. Then could you identify Exhibit 1027 for me which also came from your files?

A It's a Medicare newsletter that was issued in August of 1991.

Q And I have a few questions about the bottom part of the second page, anesthesiologist and CRNA – Single Service. [28] Could you take a moment to review that paragraph?

A (Examining document.)

Q Let me know when you're ready.

A All right.

Q Can you tell me what the background is to the publication of this paragraph, how this set of CPT codes came about?

A We had been advised by anesthetist providers as I recall that Blue Shield had come up with a list of procedure codes that they would assume medical necessity for both the anesthetist and the anesthesiologist's involvement and the request was that we would agree to the same list and we did and then published it.

Q So these are procedure codes on which Travelers considered and would reimburse for medically necessary CRNA services in addition to an anesthesiologist's service?

A That's correct.

Q And that would be on cases where there was no concurrent case? Correct?

A That's also correct.

Q All right. Did Travelers ever issue any instructions to providers as to – let me start over. Am I correct that there are two modifiers under which CRNAs could

bill, one for medically directed services and one for [29] nonmedically directed services?

A That's correct.

Q Did Travelers ever issue any instruction as to which modifier CRNAs were to use in billing for these medical necessity cases?

A No.

Q Was it your understanding that the services would be billed using the medically directed modifier?

A That's correct.

Q And am I also correct that Travelers would reimburse at two different rates for CRNA services, a medically directed rate and a nonmedically directed rate?

A That's correct.

Q And what reimbursement rate were CRNA services on medical necessity cases reimbursed?

A I don't recall what it was at that time.

Q Has it changed over time?

A Yes.

Q So at one time it was the nonmedically directed and at one time it was the medically directed rate?

A I'm sorry. I misunderstood the original question I think.

Q Okay. Let's go back. Medicare reimburses for CRNA services at one of two rates, medically directed or nonmedically directed? Is that correct?

[30] A That's correct.

Q Okay. With regard to those medical necessity cases that are discussed in Exhibit 1027, which rate did Travelers reimburse for CRNA services at?

A The medically directed rate.

Q Okay. And that policy has been consistent over the time since 1989?

A Yes.

(Discussion off the record between Attorney Fraser and Attorney Duncan.)

Q (By Mr. Duncan, continuing) Mr. Fraser raised a question with me here. In Exhibit 1026 I see that the little Bates numbers, the small numbers go 846, 847, 848 but the pages seem to be 1, 3 and 5. Did you intend to produce any more of this exhibit?

A I think there's a page missing.

Q Which page would that be?

A Our page 2.

Q Okay. Maybe we can get that during a break.

MR. STONE: Can I make a suggestion that maybe this was a double-sided document and you forgot to copy the sides of pages 1 and 3.

A I didn't personally copy them.

MR. STONE: I don't mean you. I mean Travelers, whoever did it.

* * *